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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 211

AMERICAN STEVEDORES, INC.,

Petitioner,

against

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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No. .....

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

Petitioner, American Stevedores, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 5, 1960.

Opinions of the Courts Below

By Findings of Fact and Conclusions of Law dated March 13, 1959, the Honorable Joseph C. Zavatt of the United States District Court, Eastern District of New York, awarded damages to the libelant against the respondent

and found in favor of the respondent on its impleading petition against the impleaded respondent. This decision was not officially reported, but was unofficially reported at 1959 A.M.C. 1808 and is reprinted at page 1a of the Appendix to this petition. On an appeal by petitioner herein the Court of Appeals for the Second Circuit affirmed the District Court.

The opinion of the Court of Appeals is reported in 277 F. 2d 255; it is reprinted at page 16 of the Appendix to this petition.

Jurisdiction

Judgment was entered in the Court of Appeals for the Second Circuit on April 5, 1960 (p. 21, Appendix).

Jurisdiction to review the judgment by writ of certiorari is found in 28 U.S.C. Section 1254, subdivision 1, and 2101(c), as well as in Rule 19b of the rules of this Court under this Court's power of supervision over the Federal Judicial System, and more particularly on the grounds that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of this Court and of other Courts of Appeal.

Questions Presented for Review

1. Whether a stevedore must respond in indemnity to a shipowner for a loss sustained by reason of the shipowner's negligence in the maintenance of a winch, resulting in a condition of danger, which condition, according to the District Court and the Court of Appeals existed long enough to create a superseding duty on the part of the stevedore to remove or correct.

2. Whether such a superseding duty, imposing a legal obligation to indemnify arises where the obligation to

maintain the winch was solely that of the shipowner and the only negligence attributed to the stevedore was constructive knowledge of the shipowner's breach.

Statement of the Case

Libelant, a longshoreman employed by the petitioner was injured on July 6, 1955 while working aboard the USNS Henry Gibbons moored at Pier 4, Brooklyn Army Base, New York. Libelant slipped on oil which had run from a winch across the deck to the rail at the No. 2 hatch. On two prior occasions within a short period prior to the accident he had walked over the same streak of oil. Just before the accident he had passed a ship's officer who was proceeding from the direction of that hatch. One other longshoreman had seen the oil but neither made any complaint to anyone about it.

The petitioner's hatch boss had worked all day in and out of the hatch and had not noticed oil. After the accident, he observed that there was oil which apparently had leaked from the winch.

The ship's log showed a deteriorated winch. The ship's captain found sawdust under the winch which had been placed there by the crew. It was the obligation of the crew to place sawdust on oil and remove it from the deck.

The Maritime Superintendent for the United States Army was in charge of the discharge of cargo in behalf of the United States Army. It would have been his obligation to report a leaking winch to the ship's officer.

Reasons for Granting Writ
Summary of Argument

The contractual obligation to properly maintain the winch was that of the vessel. That obligation could not be shifted to a stevedore by implied contract. Notice to a

longshoreman of a dangerous condition arising out of a vessel-owner's breach of its obligation is not such as would create a superseding duty on the part of the stevedore to correct the condition.

The duty of workmanlike performance of the stevedoring work does not include the assumption of obligations imposed upon the shipowner.

The contract between the parties requires indemnity only where the stevedore's negligence arises out of the manner in which the stevedoring work was performed, not for a failure to assume the duties placed upon the shipowner.

POINT I

The maintenance of the winch was the obligation of the shipowner. The notice of a condition of danger caused by the winch, which notice the Court of Appeals has attributed to the petitioner, has led to the imposition of an obligation on petitioner to which it neither expressly nor impliedly agreed.

By contract, the shipowner agreed to furnish and properly maintain the winch. The petitioner agreed to perform its stevedoring work in a safe and workmanlike manner. Each party to the contract had specific and well defined obligations. Because of the length of time that a winch continued to leak oil, although that would seem to emphasize the breach of obligation on the part of the shipowner, the Court of Appeals on the basis of that period of time has shifted the ship's responsibility to the petitioner.

This holding relieves the ship of the continuous duty of keeping her seaworthy. This is not the situation where the unseaworthiness is caused by the stevedore himself and the ship is held to absolute liability as a result. The

decision in the case at bar has placed a premium upon the negligence of the vessel and its crew which caused the unseaworthy condition.

United States v. *Harrison*, 245 Fed. 2nd 911.

The shipowner, in the Court of Appeals, relied upon *Ryan Stevedoring* v. *Pan Atlantic Steamship Corp.*, 350 U. S. 124; *Weyerhauser Steamship* v. *Nacirema Operating Co. Inc.*, 355 U. S. 563 and *Crumady* v. *The J. H. Fisser*, 358 U. S. 423. We submit that these cases, rather than assisting the shipowner's position, prove the contrary.

In the *Ryan* case a stevedore was held to impliedly warrant a proper and safe performance of the stevedoring work. There it was the shipowner who had failed to discover the contractor's breach and the contractor was held liable in indemnity for a loss which was caused by the stevedore's improper handling of cargo. In the case at bar the maintenance of the winch and the correction of any condition of danger caused by the winch were obligations of the shipowner.

There is no suggestion in the *Weyerhauser* case to the contrary for there, too the stevedore had created the condition which caused the accident. The decision restated the doctrine that a stevedore would be held liable for a substandard performance under such circumstances unless there was conduct on the part of the vessel sufficient to preclude recovery for indemnity. No definition of that conduct was given but we suggest such conduct is present here.

In the *Crumady* case, it was held that although the cut-off device of the ship's winch was improperly set, it was the manner in which the stevedore operated the winch which brought into play the unseaworthy condition which led to the loss for which the ship was held entitled to indemnity.

The petitioner in the instant case neither created the dangerous condition nor did it by its negligence bring into existence an unseaworthy condition. Its only fault was imputed knowledge of the shipowner's breach of the contract, which breach the Court of Appeals has erroneously condoned by shifting liability to the petitioner.

POINT II

The decision of the Court of Appeals is in conflict with that of the Court of Appeals for the Ninth Circuit.

The holding is squarely in conflict with *United States* v. *Harrison*, 245 Fed. 2d 911 (Ninth Circuit), which not only involved the identical Army contract but also was concerned with a set of facts strikingly similar to those in the case at bar.

In *United States* v. *Harrison, supra*, a longshoreman fell on an oily deck which had not been covered with sand. The Court held that the covering of the oil with sand or sawdust was the obligation of the ship and its crew and not the stevedore's responsibility.

The Court said at page 915:

> "Any attempt to require the Stevedoring Company to hold the government harmless under circumstances found in this case, by stipulations of a contract or otherwise, would be void. The unseaworthiness of this vessel created a non-delegable duty upon the agents of the government to render her seaworthy immediately. The defect was not latent, but was patent to everyone who saw the deck. If the defective condition had been concealed and the Stevedoring Company had been the first to discover it, then a burden might have been placed upon the latter under the contract. But the duty to keep the ship seaworthy, where the conditions are open and notorious to all who

looked, is not only nondelegable, but continuous upon the shipowner, master and crew."

There, as here, the shipowner argued that the provisions of the contract in the exact wording found in pages 13 to 14 of the Appendix should hold the stevedore because it, through the exercise of due diligence, could otherwise have avoided such damage or injury. The Ninth Circuit rejected this contention, pointing out that the stevedore had not created the condition and its imputed knowledge of the dereliction by the ship did not constitute the active negligence found on the part of the stevedore in *United States* v. *Arrow Stevedoring*, 175 Fed. 2d 329, cert. denied 338 U. S. 904 where indemnity had been allowed.

The contention that the stevedore could have avoided damage rejected in *United States* v. *Harrison* was the sole basis for the Court of Appeals holding petitioner liable for indemnity in the instant case. Actually the facts are stronger in favor of the stevedore here, because in this case the oil came from a winch, the maintainence of which was exclusively that of the shipowner, whereas in *Harrison* the oil dropped from the jeeps which constituted the cargo being loaded by the stevedore. The cargo handling created the condition there; here the ship's machinery created the condition.

The language of the contract (p. 13 of the Appendix) obviously refers to a condition which the stevedore, by his own act has created or which has brought into play an unseaworthy condition either of which would not have resulted had the stevedore's work been properly performed.

Nothing in this language suggests that actual or constructive notice of a shipowner's default in the performance of its obligation requires the stevedore to assume that obligation which was foreign to its contract and

specifically that of the vessel. Such is the rationale of the decision by the Court of Appeals of the Ninth Circuit and, we submit, the proper holding.

The misconception by the Court of Appeals in the case at bar of the obligation imposed upon the petitioner herein is emphasized by a subsequent, irreconcilable holding by the same Court, *Calderola* v. *The Cunard Steamship Company*, decided May 31, 1960 (slip sheet p. 1885) in which it was held that the plaintiff's knowledge of grease on a ladder was not binding upon his employer and indemnity was disallowed. Although rejected by the Court, there was evidence that the cargo fall while being used by the longshoreman may have caused the step to become slippery. Alleging inconsistency with the *Santomarco* holding, the Cunard Steamship Company has served a petition for rehearing therein.

POINT III

The judgment appealed from, relieving from liability the wrongdoer whose negligence caused a dangerous condition and transferring that liability to one who knew or should have known of the former's dereliction is inequitable and contrary to the maritime and civil policy of this Court.

A denial of a writ of certiorari would leave standing a decision holding a stevedore liable for knowledge imputed to him of a dangerous condition caused by negligence of the vessel in the maintenance of its winches. Such is not the state of the law and if a contract purports to provide for the escape from liability of the wrongdoer at the expense of one who at best should have known of the other's dereliction, such contract would be void as a matter of public policy.

We refer the Court to its decision in *Bosso* v. *Inland Waterways Corporation*, 349 U. S. 85, where a contract was construed which purported to exempt from all lia-

bility for negligence. That provision was held to be invalid. The same policy considerations set forth therein would appear to disapprove of any rule of law which would permit the negligent shipowner from transferring its obligation to the stevedore. Although the *Bosso* case was not cited by the Court of Appeals in *U. S.* v. *Harrison*, *supra*, the same principle was applied in declaring the contract void.

The judgment appealed from, if allowed to stand would constitute authority for a stevedore being held liable for any condition of danger aboard a vessel as long as that condition existed for an appreciable period of time. Such a result, we submit, would not be predicated upon a true evaluation of the law as it now exists.

To preserve uniformity of standards of review, to afford petitioner its only opportunity for review of a judgment against it, it is respectfully requested that the petition be granted and having been granted, the judgment of the Court of Appeals for the Second Circuit and of the District Court be reversed and the impleading petition of the United States of America against American Stevedores, Inc. be dismissed.

Respectfully submitted,

BERN BUDD,
Counsel for Petitioner.

APPENDIX TO PETITION.

Findings of Fact and Conclusions of Law of District Court.

[469] The above entitled cause came on regularly for trial and the court having duly considered the evidence and being fully advised in the premises now finds the following:

Findings of Fact

1. On July 6, 1955 the libelant, Thomas Santomarco, was in the employ of American Stevedores, Inc., (hereinafter referred to as American), the respondent-impleaded. The libelant was a longshoreman. He was engaged that day in the course of his employment as a winch operator in connection with the loading of the U.S.N.S. Henry Gibbins, a vessel owned and operated by the United States, the respondent herein.

[470] 2. Prior to 4:30 P. M. the libelant worked at hatch number 4 of the vessel. At about that time he and his gang were shifted forward to work at hatch number 1. In walking forward on the starboard side of the vessel, the libelant passed at one point between the starboard winch for the number 2 hatch and the pontoons used to cover hatch number 2 which were stacked inboard the starboard rail of the vessel. At this point he saw what the court finds to be a slick of oil approximately six inches wide extending from the winch, across the deck, and thence under the pontoons toward the starboard rail. A number of persons had walked through the slick and there were oily tracks on the deck on either side of the slick.

3. The libelant walked safely through this area to his place of work at hatch number 1. At some time prior

to 6:00 P. M. the libelant felt in need of a drink of water. Knowing that there was water in the vicinity of hatch number 4, he proceeded aft on the starboard side of the vessel, and again passed safely through the oil slick and tracks in the vicinity of the starboard winch of hatch number 2.

4. Having refreshed himself, and carrying a container of water for a co-worker, the libelant at about 6:00 P. M. proceeded forward again along the path which he had twice previously travelled. This time, in attempting to [471] pick his way through the slick and the oily tracks, he slipped on the oil on the deck, fell, and struck his head and left hip on either the winch or the deck.

5. The oil on the deck was seen by the witness D'Ambra, a longshoreman employed by American aboard the vessel on July 6, 1955, at the time of the accident, and earlier that day. He made no report as to the presence of the oil. The same oil was seen by the witness Bracco, American's hatch boss at hatch number 2, at the time of the accident. Prior to that time no one had reported the presence of oil to him. Had anyone done so he would have reported the matter to one of the ship's officers and suspended work in the vicinity until the oil was removed.

6. It was the duty of every member of the ship's crew to immediately place sawdust upon any oil observed on the ship's deck. It was the duty of American's employees to keep the areas in which they worked in a clean and safe condition. With regard to the condition existing here, it was the duty of American's employees who were aware of the presence of the oil to cover it prior to continuing work, or to notify a stevedore foreman or hatch boss, who would then have the duty, prior to permitting work to continue, of either removing the dangerous con-

dition or reporting the presence of the oil to the ship's officers.

7. The oil which caused the libelant's fall [472] remained in a conspicuous and well traveled area of the deck for a period of at least one and one-half hours prior to the accident.

8. The court finds that the libelant and D'Ambra, as well as other employees of American working aboard the vessel, knew of the presence of the oil a sufficient time before the accident to have been able to take steps to prevent its occurrence.

9. The ship was being loaded in preparation for a voyage. There was a crew aboard, including an oiler, whose sole job it was to care for the winches. The officers of the vessel were in control thereof at all times prior to the accident.

10. Neither American's employees nor the ship's personnel took any steps whatever to report, or to alleviate, the danger caused by the presence of the oil on the deck.

11. The evidence is insufficient to enable the court to make a finding as to the cause of the oil on the deck. In view of the conclusion, *infra*, that the libelant was contributorily negligent in proceeding through an area of known danger without reporting or acting to remove the oil from the deck, the court makes no finding on the conflicting evidence as to whether the libelant may have chosen a safer route on the port side of the vessel to accomplish his mission.

[473] 12. As a result of the accident the libelant suffered a cerebral concussion, contusion of the occipital re-

gion of the scalp, and contusion and sprain of the left lower back and left hip. His medical expenses occasioned by these injuries amounted to $382.35. He could not work for a period of seven months following the accident, and could at no time after the accident work at his usual employment as a longshoreman because of a recurring dizziness which he suffers upon changing position. The libelant retired from work permanently in the summer of 1957 because of his age. The court finds that the libelant lost earnings of $4,800 as a result of the accident, and that in the absence of contributory negligence the libelant would be entitled to recover $1,000 for the pain and suffering occasioned by his injuries.

13. The contract between the respondent and American under which American performed the stevedoring services on the day in question provided as follows:

"CLAUSE 12. *Liability and Insurance.*

a. The Contractor

* * * * * *

(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury to or death of persons

occasioned either in whole or in part by the negligence or fault of the contractor, [474] his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

b. The Contractor shall not be responsible to the Government for and does not agree to hold the the Government harmless from loss or damage to property or bodily injury to or death of persons:

Appendix to Petition.

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

(2) If the damge, injury or death resulted solely from an act or omission of the Government or its employees or resulted, solely from proper compliance by officers, agents, or employees of the Contractor with specific directions of the Contracting Officer."

Conclusions of Law

1. The oil upon which the libelant slipped was an unseaworthy condition and its presence constituted a breach of the respondent's absolute and non-delegable obligation to provide the libelant with a seaworthy vessel upon which to perform his work.

[475] 2. The long-standing and conspicuous nature of the dangerous condition existing herein are deemed sufficient to charge the respondent's officers and employees with knowledge of its presence. The court concludes, on this basis, that the respondent was negligent in failing to cover or otherwise remove the oil from the deck.

3. The libelant was negligent in failing to report the presence of the oil, in failing to cover or otherwise re-

move the oil on each of the three occasions on which he saw it, and, under all the circumstances, in attempting to proceed through an area of known danger. The court concludes that the libelant's negligence was fifty per cent of the producing cause of his injuries.

4. The employees of American were negligent in failing to remedy or report a danger known to them.

5. The libelant is entitled to a decree against the respondent in the amount of $3,091.18, i. e., one half of the total damages of $6,182.36 suffered by the libelant as a result of the accident.

6. The injuries to the libelant were occasioned in part by the negligence of American's employees in the performance of work under the contract. The employees of American knew of the existence of the unseaworthy condition causing the libelant's injuries, and the exculpatory provisions of American's indemnity agreement are inapplicable. [476] Under the express provisions of the contract the respondent is entitled to a decree in the amount of $3,091.18 against the respondent-impleaded, indemnifying the respondent for the damages for which it is held liable to the libelant.

The parties will settle a decree in conformity herewith, and will file therewith such proposed additional findings of fact and conclusions of law as are considered by them to be necessary.

JOSEPH C. ZAVATT
U. S. D. J.

Appendix to Petition.

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 234—October Term, 1959.

(Argued March 8, 1960 Decided April 5, 1960.)

Docket No. 25833

THOMAS SANTOMARCO,

Libellant,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

—and—

AMERICAN STEVEDORES, INC.,

Respondent.

Before:

LUMBARD, *Chief Judge.*
HAND and LEWIS, *Circuit Judges.*

On appeal from a decree in the admiralty of the District Court for the Eastern District of New York, ZAVATT, *J.*, presiding, holding the United States liable for injuries suffered by the libellant, a longshoreman, on board a vessel of the United States, and holding the American Stevedores, Inc. liable to the United States on a contract of indemnity.

Appendix to Petition.

MORRIS CIZNER, *for the libellant.*

WALTER L. HOPKINS, *for the United States.*

ALBERT S. COMMETTE, *for the American Stevedores, Inc.*

HAND, *Circuit Judge*:

This is an appeal from a decree in the admiralty of the District Court for the Eastern District of New York holding the United States liable to the libellant, a longshoreman, for injuries suffered on board the ship, "Henry Gibbins," and also holding the American Stevedores, Inc. (which we shall call "Stevedores") liable to the United States for indemnity under a contract between the parties. The facts were as follows.

The ship, "Henry Gibbins," owned by the United States was being loaded in Brooklyn, her starboard side against the pier. The libellant was a longshoreman, employed by "Stevedores," and was at work as a winch operator at the forward hatch (No. 1). At some time before four p.m. that day he had been at work at an after hatch, No. 4, and had moved to the forward winch. There was a winch at hatch No. 2, that had leaked oil, either because it had been overfilled, or was mechanically injured. The oil ran from the bottom of the winch across the deck, under some pontoons temporarily placed nearby, and thence to the starboard rail. Between the winch and the nearest pontoon the oil had spread to a streak six inches wide, and it had been tracked to a greater width by the foot-prints of a number of persons who had passed between the winch and the pontoons during the afternoon. Earlier in the afternoon the libellant had walked through this passage on his way forward from hatch No. 4 to hatch No. 1, and at about six o'clock, wishing to get a drink of water, he

again walked through it to hatch 4. On coming back with water for another workman he walked through the passage a third time, and that time he slipped on the oil and fell on the deck, injuring his head, back and left hip.

Judge Zavatt held the United States liable under the maritime law because the libellant's injuries were the result of an unseaworthy condition of the deck, but he also held that the libellant had been guilty of contributory negligence "because he proceeded through an area of known danger without reporting or acting to remove the oil from the deck." He made no finding as to whether the libellant could have avoided the spot of oil by bringing back the water on the port side. Because of the libellant's contributory negligence he reduced h recovery by fifty per cent.

The liability, so reduced, the judge imposed on "Stevedores" under its contract to indemnify the United States, which therefore became only secondarily liable. That contract provided that "Stevedores" would "hold the Government harmless from any loss * * * for bodily injury * * * of persons"; but to this engagement there were two exceptions of which only the first is relevant here. This exception absolved "Stevedores," if "the unseaworthiness of the vessel or failure or defect of gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor * * * and the Contractor, its officers, agents, and employees, by the exercise of due diligence could not have been [sic] discovered such unseaworthiness or defect of gear or equipment or through the exercise of due diligence could not otherwise have avoided" the injury. In this case it was the "unseaworthiness" of the ship that "contributed jointly with" a "fault or negligence of the contractor," because the spot of oil was evident to employees of "Stevedores" other than the libellant, who were at work thereabouts, and who did not call the attention of any of the ship's company to it, or

ask to have it wiped up or sprinkled with sawdust. Moreover, if that would not have "avoided" the injury—which there is every reason to suppose that it would—by the "exercise of due diligence" they could have wiped up the oil themselves. Hence "Stevedores" is liable for any recovery.

The libellant appeals from the award because, as we have said, the judge allowed him only half the damages suffered. He argues that he was not negligent, and that in any event the amount allowed for pain and suffering was insufficient. As to contributory negligence, like all negligence, it presupposes a choice between conflicting values, and in the case at bar we need not say that, if the libellant had had to choose between an immediate recovery of property of value and taking the risk of the slippery deck, he would have been negligent. Although it is customary to say that negligence is a question of fact, it always involves an appraisal of values, and while ordinarily values are to be appraised by the standard commonly accepted in the circumstances, that is not their inevitable measure. We need not, therefore, consider whether most persons in the libellant's position would have used the passage. For argument we will assume that they would, but it does not follow that it was not negligent to do so. "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Holmes, *J.*, *Texas & Pacific Railway Co.* v. *Behymer*, 189 U. S. 468, 470. "Ordinary care, then * * * implies the exercise of reasonable diligence, and reasonable diligence implies, as between the employer and employé, such watchfulness, caution, and foresight, as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise." *Wabash Railway Co.* v. *McDaniels*, 107 U. S.

454, 460; *S. H. Kress & Co.* v. *Telford*, 240 Fed. (2) 70, 73 (C. A. 5); *The T. J. Hooper*, 60 Fed. (2) 737, 740 (C. A. 2). It appears to us that, however likely it may be that the ordinary longshoreman would have taken the risk of walking on the oil spot, to do so involved an obvious hazard and was an impermissible imprudence.

As to the insufficiency of the award of $1,000 for suffering and permanent injury, it is idle to seek any objective test, even more idle than to seek an objective test of negligence itself. It is true that at times we have increased such awards, as for example, *United States Fidelity & Guaranty Co.*, 152 Fed. (2) 46; but that is only in extreme cases. *Carroll* v. *United States*, 133 Fed. (2) 690, 693, 694 (C. A. 2); *Lukmanis* v. *United States*, 208 Fed. (2) 260 (C. A. 2). In the case at bar, were I to decide the issue alone, I should raise the award, but my brothers think that the evidence is not strong enough to justify such an unusual exercise of appellate power. For that reason the decree will be affirmed.

Decree affirmed.

Appendix to Petition.

Judgment Appealed From.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at The United States Courthouse in the City of New York, on the fifth day of April one thousand nine hundred and sixty.

Present: HON. J. EDWARD LUMBARD, Chief Judge.
HON. LEARNED HAND,
HON. DAVID T. LEWIS, Circuit Judges.

THOMAS SANTOMARCO,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellant,

and

AMERICAN STEVEDORES INC.,
Impleaded-Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the respondent-appellant (United States).

A. DANIEL FUSARO,
Clerk

Appendix to Petition.

Excerpts From Contract Between United States and American Stevedoring Company Inc.

h. *Gear Supplied by Government.* The Government (at its own expense) shall furnish and maintain in good working order the following: blocks on booms, booms, cranes, wire and/or rope falls rigged, gantlines rigged on booms, hatch tents, lighters and floating derricks, lights on wharves and vessels, pallet boards, power and steam necessary, preventors on booms, winches. Floating derricks and dock cranes will not be used when, in the opinion of the Contracting Officer, the ship's equipment can be used satisfactorily.

"CLAUSE 12. *Liability and Insurance.*

a. The Contractor . . .

* * * * * *

(2) shall be responsible for and shall hold the Government harmless for any and all loss, damage, liability and expense for * * * bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the contractor, [474] his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

b. The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons:

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death,

and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents, or employees of the Contractor with specific directions of the Contracting Officer."

Excerpts From Transcript of Testimony of the District Court.

CHARLES BARNES DEITCH, called as a witness on behalf of the respondent, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wilson:

Q. What do you do for a living, Mr. Deitch? A. Marine superintendent for the U. S. Army.

Q. Where do you work? [182] A. Brooklyn Army Terminal, Brooklyn, 58th Street.

Q. How long have you worked there, sir? A. It will be eighteen years in March.

Q. What does your work involve? Just what do you do? A. I superintend the loading, discharging, embarkation of passengers, debarking of passengers, general pier work.

Q. What, if any, relation do you have with the stevedoring people who load and discharge the Government vessels? A. I superintend the operation for the Army.

Q. How long have you been at the Army Base doing that? A. The Brooklyn Army Terminal?

Q. Yes, sir. A. Well, I was connected with them in Staten Island, it is all one branch, since 1941, with overseas duty—

Q. Excuse me? A. With some overseas duty.

Q. Where were you working in July, 1955? Do you remember? A. Pier 4.

Q. Where is that? A. Brooklyn Army Terminal.

[183] Q. Do you remember whether or not that work involved the U. S. N. S. Henry Gibbins during July, 1955? A. Yes, it did.

* * * * * * *

Cross Examination (continued) by Mr. Commette:

Q. Mr. Witness, you said that you, as a representative of the Army, superintended the operation of the stevedoring? Is that correct? A. Yes, sir.

Q. Now, would you please tell the Court in a little more detail what you mean by superintending the operation of the stevedores for the Army? A. Well, I order the gangs. I see that the cargo is dispatched properly, and properly handled.

Q. Does that bring you aboard the vessel throughout the day when the cargo operations are proceeding? A. Off and on, yes, sir.

Q. And do you have anything to do with reporting any conditions to the ship's personnel, that is, any conditions that you feel should be changed with respect to the stevedoring operation? A. Yes, sir.

Q. Would it be the customary practice in the event that there were come condition that had been reported by longshoremen to their foreman, that the foreman reports to [210] you, or would there be a custom and practice for you to report any condition that you knew of directly to the ship? A. That is correct.

Q. In the event that sometime during the course of the work you yourself saw some condition in connection with the stevedoring work that required a change on the part of the ship's personnel, would you personnally report that to the appropriate officer on the part of the ship? A. Yes, sir.

Q. And is that usually the chief officer who is in charge of deck operations? A. Or the officer on watch. Usually it goes to the cargo officer.

Q. In the event that there had been any complaint to you about a leaking winch, or oil leaking from a winch brought to your attention, would that be something that you would communicate to the ship's officers, one of the ship's officers? A. Yes, I would.

Q. And that would apply not only to the operation of the winch, but to the leaking oil from the winch—would that also be something that you would report to the appropriate ship's officer? A. Any safety factor I always report.

[211] Q. Then from then on it would be up to the ship's personnel to clean the oil, or whatever had to be done? Isn't that true? A. Yes, sir.

* * * * * * *

The Court: Now, what else do you mean by superintending the loading operations?

The Witness: Well, there is proper stowage. Of course we have other men that watch that, you see, outside of myself.

The Court: Well, to see what? You say "proper stowage." What do you mean?

The Witness: Yes, sir.

The Court: What do you mean by that? What is your concern with proper stowage?

The Witness: Well, for the safety of cargo. Safety of the ship. And availability of discharge. No over

storage. And more or less general supervision of the loading of cargo.

The Court: All right.

Do you give orders to the stevedores?

The Witness: Yes, sir.

[214] The Court: What kind of orders would you give them?

The Witness: I instruct them where; which hatches to work; what to work; and the time to work; and when to knock off.

* * * * * * *

KARL H. NEHRING, called as a witness on behalf of the respondent, having been first duly sworn, testified as follows:

The Court: Assuming, Captain, that on the 6th in the late afternoon, or say about six o'clock, assuming for the moment that there were oil on the deck near that winch, and someone saw it—someone connected with the crew—what would they do with that oil?

The Witness: The first thing they would have done is spread sawdust. The next thing they would have done is clean it up, if it was like it would run over the deck, and the sawdust—as far as this going back to the area where the sawdust is, it is my belief that that sawdust was put there to soak up any oil that might come out of the winch.

The Court: No. Forget the particular sawdust you saw.

If someone at around six o'clock the night before had seen the oil near that winch?

The Witness: They would clean it up.

[227] The Court: They would have thrown sawdust on it?

The Witness: First of all.

The Court: Now, they wait until the sawdust would absorb the oil?

The Witness: Yes.

The Court: How long would that take?

The Witness: It doesn't take very long.

The Court: Then you say they would clean it up.

Now, how much time would elapse from the time they threw the sawdust down until the time they clean the whole thing up?

The Witness: Sometimes only a matter of ten or fifteen minutes to get a man to work.

The Court: So that if there had been oil near that winch at six o'clock the previous day, the sawdust that you saw there on the 7th would not be the sawdust that was thrown to cover up and absorb the oil that someone saw at six o'clock the previous day; is that right?

The Witness: The sawdust underneath the casing could be the same, yes, but if there had been any sawdust there on the other part of it, if there was any oil there now, I examined the deck—

The Court: Now, would that mean that in your [28] opinion that the sawdust that was under the casing was there, because in cleaning up, they had not cleaned up all the sawdust?

The Witness: They left it there in case there was any more oil leaking out, so it would be absorbed right there. It wouldn't get any chance to run out any place.

* * * * * * *

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No. 214

In the Supreme Court of the United States

OCTOBER TERM, 1960

AMERICAN STEVEDORES, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Eastern District of New York (Pet. App. 10–15) are reported at 1959 A.M.C. 1808. The opinion of the Court of Appeals for the Second Circuit (Pet. App. 16–20) is reported at 277 F. 2d 255.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1960 (Pet. App. 21). The petition for a writ of certiorari was filed on July 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner is liable under its stevedoring contract to indemnify the United States for losses sustained as a result of an injury to one of petitioner's employees.

STATEMENT

Petitioner, a stevedoring contractor, contracted with the United States for the unloading of the *Henry Gibbons*, a vessel owned and operated by the United States (Pet. App. 17, 22). Under the contract, petitioner agreed that it would indemnify the United States "for any and all loss, damage, liability and expense for * * * bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the contractor [*i.e.*, petitioner], his officers, agents, or employees in the performance of work * * *." The contract contained two "specific limitations" to petitioner's "general liability and responsibility" to indemnify the United States. First, petitioner was not to be liable if "the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such * * * injury or death, and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment or through the exercise of due diligence could not otherwise have avoided such * * * injury, or death." Second, petitioner was not to be liable "if the * * * injury or death resulted solely from an act or omission

of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the Contracting Officer" (Pet. App. 22–23).

Santomarco, a longshoreman employed by the petitioner, was injured while participating in the unloading of the *Henry Gibbons*. He sued the United States, who impleaded petitioner under its contract of indemnity. After a trial, the district court found that the accident occurred when Santomarco slipped and fell in some oil which had run across the deck of the vessel during the unloading operation (Pet. App. 10–11). This oil had been in a well-traveled and conspicuous part of the deck for at least one and one-half hours before the accident (Pet. App. 12) and was known to Santomarco and other employees of petitioner for a time sufficient to enable them to take steps to prevent the accident (Pet. App. 12). Petitioner's employees did not report the oil to petitioner's hatch boss, who, in turn, the court found, could have reported the matter to one of the vessel's officers and suspended work in the vicinity of the oil until it was removed (Pet. App. 11).

The court found that the accident was caused by the unseaworthiness of the vessel combined with the negligence of Santomarco, the United States, and petitioner. On the basis of these findings, the court determined that the United States was liable to Santomarco for one-half of his damage. The court further held that, because the accident was, under the terms of the indemnity contract, "occasioned in part" by petitioner's negligence, the Government

was entitled to indemnity from petitioner for the amount of its liability to Santomarco. Since petitioner was aware of the presence of the oil on the deck, the court concluded that neither of the limitations upon the indemnity clause was applicable.

Petitioner appealed from the determination that it was liable under the indemnity clause. The Court of Appeals for the Second Circuit affirmed, holding (Pet. App. 18–19):

> In this case it was the "unseaworthiness" of the ship that "contributed jointly with" a "fault or negligence of the contractor," because the spot of oil was evident to employees of "Stevedores" [*i.e.*, petitioner] other than the libellant, who were at work thereabouts, and who did not call the attention of any of the ship's company to it, or ask to have it wiped up or sprinkled with sawdust. Moreover, if that would not have "avoided" the injury—which there is every reason to suppose that it would—by the "exercise of due diligence" they could have wiped up the oil themselves. Hence "Stevedores" is liable for any recovery.

ARGUMENT

The decision of the court of appeals was clearly correct and is not in conflict with the decision of any other court. Further review is not warranted.

1. Petitioner contends that the United States was not entitled to indemnity because the Government was responsible for the maintenance of the winch from which the oil had originally leaked onto the deck.

As both courts implicitly recognized, however, the source of the oil is totally immaterial. What is of importance is the fact that, regardless of where it came from,[1] the oil was on the deck for a period sufficient to enable petitioner's employees, who actually knew it was there, to cover it, clean it up, or report it to the ship's officials. Clearly, their failure to do so was, in the words of petitioner's agreement to indemnify (see *supra*, p. 2), "negligence * * * in the performance of work under [the] contract" which caused "in whole or in part" the injury to Santomarco. Further, the clauses limiting the agreement to indemnity clearly do not apply since the oil on the deck was neither a defect which the employees of petitioner "could not have discovered * * * by the exercise of due diligence," nor a condition which "resulted solely from an act or omission of the Government."[2]

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[1] The district court expressly stated that the evidence was insufficient to enable it to make a finding as to what caused the oil to be on the deck (Pet. App. 12). The court of appeals stated that it came from a winch which had leaked or overflowed (Pet. App. 17).

[2] Even if, as petitioner claims, the United States were responsible for the winch, this does not support petitioner's contention that (Pet. 8–9), if applicable, the indemnity clause is void. Irrespective of who had control of the winch, the fact remains that the injury was found to have been partially occasioned by the negligence of petitioner. As applied here, the indemnity clause is fully consistent with general principles of maritime law, since it makes the stevedore liable in indemnity for failure to exercise reasonable care in performing its duties. *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423; *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124; see also *United States* v. *Harrison*, 245 F. 2d 911, 914 (C.A.

2. Petitioner also contends (Pet. 6–7) that the decision of the court of appeals is in conflict with *United States* v. *Harrison*, 245 F. 2d 911 (C.A. 9). There, the United States as shipowner was likewise adjudged to be liable to a longshoreman who had slipped and been injured on an oily deck, and attempted to obtain indemnity from the longshoreman's employer under contract provisions identical to those involved here. The Ninth Circuit upheld the district court's ruling that the stevedoring contractor was not liable under the contract because the injury did not result from any negligence of the contractor.

In finding that the contractor was not negligent, both courts in *Harrison* expressly relied on the fact, not mentioned by the petitioner here, that, before the accident, the stevedoring contractor had called the oily condition of the deck to the attention of the ship's officers, and had proceeded to work on the deck only at the insistence of the ship's officers. By contrast, in this case the courts below found that petitioner was negligent by reason of the *failure* of its employees to report the oily condition of the deck to the ship's officers, or to do anything else to remedy the dangerous condition created by the oil. This finding of negligence, which was fully supported by the evidence, makes petitioner clearly liable under the terms of its contract.

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9), which cites with approval *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (C.A. 9), certiorari denied, 338 U.S. 904.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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